Supreme Court, U.S.

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE SAMMETT CORPORATION,
Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the United States Courts of Appeals routinely vacate district court final judgments in cases which are settled while on appeal, especially as to a party which did not participate in the settlement arrangement and objected to vacatur?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner, The Sammett Corporation ("Sammett"), discloses that it is a corporation incorporated in Pennsylvania, and has no parent companies, subsidiaries or affiliates at the present time.

Besides Petitioner, the appellees in the proceedings below included: Medicare Patient Aid Centers, a Florida corporation, at the time a wholly-owned subsidiary of Sammett; Venice Hospital, a Florida corporation and wholly-owned subsidiary of Gulf Area Medical Programs, also a Florida corporation; Gulf Area Medical Programs, itself; Gulf Area Diversified Services, a Florida corporation and wholly-owned subsidiary of Gulf Area Medical Programs; and Hospi-Home (d/b/a Medicare Patient Aid Centers), a joint venture general partnership half owned by Sammett and half owned by Gulf Area Diversified Services.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit ordering the dismissal of the appeal and vacating the district court's judgment, reported at 9 F.3d 893 (11th Cir. 1993), is reproduced at pages 1a-14a of the appendix to this petition ("Pet. App."). The circuit court's order granting rehearing *en banc* and vacating the panel's decision, reported at 979 F.2d 806 (11th Cir. 1992), is reproduced at Pet. App. 66a-67a. The panel opinion of the Eleventh Circuit, reported at 919 F.2d 1550 (11th Cir. 1990), is reproduced at Pet. App. 15a-51a. The opinion of the United States District Court for the Middle District of Florida, Tampa Division, reported at 703 F. Supp. 1513, is reproduced at Pet. App. 52a-65a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was filed and entered on December 28, 1990. On January 17, 1991, Petitioner and the other appellees filed a petition for rehearing and suggestion for rehearing *en banc*, which the circuit court granted on November 10, 1992. The final opinion of the court of appeals was issued on December 1, 1993. Pet. App. 1a-14a. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

A. Introduction

Petitioner, a defendant in the underlying case who had prevailed in the district court, lost the benefit of that judgment when the court of appeals ordered it vacated following the settlement of the matter between the plaintiff (Respondent) and the most-significant defendant, but not Petitioner. The case thus presents an issue almost identical to that presented to this Court in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 114 S. Ct. 425 (1993), but without the defect in standing that led to *Izumi*'s ultimate dismissal.

Inasmuch as this Court had granted certiorari in *Izumi* to resolve a split among the circuits as to the interpretation of the *Munsingwear* doctrine, it is clear that the Court is well aware of the fact that there is significant discontinuity in the way vacatur is being addressed throughout the nation. Just as *Izumi* concerned the automatic application of vacatur upon settlement in the Federal Circuit, the instant case considers the automatic application of vacatur in the Eleventh Circuit. However, inasmuch as Petitioner inarguably was a party to the litigation throughout, the instant case does not suffer from

the impediment that caused the Court to dismiss *Izumi*. Moreover, the circuit court's vacatur as to a party who had not participated in a settlement and had opposed vacatur represents an extension of the *Munsingwear* doctrine even beyond the compass of the Federal Circuit's judgment in *Izumi*.

For these reasons, Petitioner respectfully submits that the instant case presents a useful and appropriate vehicle for the Court to enunciate a consistent national rule delineating the extent to which vacatur should be ordered when a case becomes moot while on appeal.

B. Factual and Procedural History

The case originated with Respondent's complaint that, through a joint venture between Venice Hospital and a subsidiary of Petitioner set up to market durable medical equipment, the various defendants violated both federal antitrust law and Florida tort law. Pet. App. 2a. A jury returned a verdict in Respondent's favor, finding that the defendants had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and also had tortiously interfered with Respondent's business advantage under state law. Pet. App. 2a-3a. The jury awarded Respondent $760,983, which was trebled on the antitrust counts for a total of $2,282,949. Pet. App. 3a.

Thereafter, the trial court granted the defendant's motion for judgment notwithstanding the verdict, holding that the evidence and inferences presented by Respondent were, under controlling case precedent, legally insufficient to establish antitrust or tort violations. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 703 F. Supp. 1513 (M.D. Fla. 1989). Pet. App. 52a-65a. In particular, the district court found that there was no evidence of coercion or retaliation that led to purchasers' frequent choice of the defendants' products over those of Respondent, and therefore held that the entire course of the defend-

ants' conduct was both economically rational and legally justifiable. Pet. App. 63a.

Following Respondent's appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the district court and ordered the reinstatement of the jury's verdict. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550 (11th Cir. 1990). Pet. App. 15a-51a. However, the court's mandate never issued (see Pet. App. 3a), and the panel's opinion was vacated when the circuit court as a whole granted the defendants' petition for rehearing and suggestion for rehearing *en banc*. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 979 F.2d 806 (11th Cir. 1992). Pet. App. 66a-67a.

While the rehearing petition was pending, Respondent and the lead defendant, Venice Hospital, entered into a settlement agreement. Pet. App. 3a-4a. As the *en banc* court of appeals later stated, "[d]uring the negotiations, the district court's final judgment remained in effect . . . because the panel's mandate had not issued. . . ." *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 9 F.3d 893 (11th Cir. 1993). Pet. App. 3a.

There ensued a dispute among the settling parties about whether there had been a breach of their agreement, and whether the panel opinion would become law because the mandate would issue (as noted, it never did). Pet. App. 3a-4a. That dispute was soon resolved, and Venice Hospital paid to Respondent an amount covering the entire trebled jury award and Respondent's costs and attorney's fees. Pet. App. 4a-5a. The settling parties' agreement did not, however, require Respondent to execute any form of release, thus enabling Respondent to pursue additional claims against Venice Hospital and the other defendants, including Petitioner, which Respondent now has done. Pet. App. 5a.

Venice Hospital moved to withdraw its rehearing petition, and also requested that the rehearing petition as to Petitioner be involuntarily dismissed. Pet. App. 5a. The

panel rejected that effort, holding that "a settlement that requires withdrawal of a joint petition for rehearing and issuance of a mandate . . . would result in preventing consideration of the [petition] filed by [Petitioner]." Pet. App. 5a. The circuit court then took the case *en banc*. Pet. App. 67a.

After the case was briefed to the *en banc* court, and a few days before oral argument, the court asked the parties whether the now-executed settlement had rendered the appeal moot. Venice Hospital, in essence withdrawing from the appeal in view of its settlement with Respondent, said nothing. Petitioner and Respondent each filed a supplemental memorandum arguing against mootness. Respondent's argument was based upon an erroneous view of the court's mandate process. See Pet. App. 10a. Petitioner argued that the case was not moot because, notwithstanding the settlement between Respondent and Venice Hospital, Petitioner still could be subjected to the payment of interest and fees as to the original judgment, a point with which Respondent did not disagree. See Pet. App. 8a, 10a.

The bulk of Petitioner's supplemental response to the court as to mootness, and a considerable portion of the oral argument it later presented, was directed to its view that, irrespective of mootness, the judgment of the district court should not be vacated.

Reviewing the settlement agreement, itself, and the representations that the settling parties had made about it (see Pet. App. 5a), the *en banc* court of appeals found "that the settlement agreement fully disposed of [Respondent's] claims and, therefore, that no case or controversy remained at the time we decided to grant rehearing." Pet. App. 6a. Concluding that the case was moot, a holding not material to the instant petition, the Eleventh Circuit required—appropriately, given its holding that it then lacked jurisdiction—the dismissal of the appeal and the withholding of the mandate, and the negation of

the panel opinion pursuant to Fed. R. App. 42. Then, without any apparent consideration of the specifics of the case or any distinction attempted between the interests of the settling parties and the interests of Petitioner, which had opposed vacatur, the Eleventh Circuit applied a mechanistic rule requiring the vacation of the judgment of the trial court favorable to Petitioner.

Based upon Eleventh Circuit precedents, particularly *In re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983), and *Dunn v. Blue Ridge Telephone Co.,* 888 F.2d 731 (11th Cir. 1989), the court held:

> We have stated that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss the case as moot." *Ghandtchi,* 705 F.2d at 1316. The same result obtains when the case is mooted at a later stage of the review process.

Pet. App. 11a.

The court premised this automatic and frequently-followed procedure on its view that its action was consistent with the "teaching and practice" of this Court, enunciated in *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39-40 (1950), and *Duke Power Co. v. Greenwood County,* 299 U.S. 259, 267 (1936), and implied in *City Gas Co. v. Consolidated Gas Co.,* 499 U.S. 915 (1991), and *Great Western Sugar Co. v. Nelson,* 442 U.S. 92 (1979). Pet. App. 12a-13a.

Petitioner respectfully submits that this holding is incorrect and, in this case, inconsistent with the interests of justice and judicial economy. Petitioner therefore requests that this Court grant this petition for certiorari to resolve the important question of federal law presented, and the split among the circuits that, but for a flaw in

the petitioner's standing in *Izumi*, would have been addressed in that case.

REASONS FOR GRANTING CERTIORARI

I. THE ELEVENTH CIRCUIT ACTED ERRONEOUSLY AND INCONSISTENTLY WITH THIS COURT'S PRECEDENTS WHEN IT VACATED THE JUDGMENT OF THE DISTRICT COURT

A. *Munsingwear* and Its Related Supreme Court Cases Do Not Demand an Automatic Order of Vacatur When a Case Is Settled on Appeal

In mechanistically ordering vacatur of the district court's opinion, the Eleventh Circuit believed that it was acting consistently with this Court's holding in *Munsingwear*, 340 U.S. 36, and related cases such as *Great Western Sugar*, 442 U.S. 92, and *Duke Power*, 299 U.S. 259. The court of appeals did not mention *Karcher v. May*, 484 U.S. 72 (1987), which offers a helpful context for evaluating *Munsingwear*. In any event, the Eleventh Circuit (and as we show, *infra*, other circuits as well) has misapplied these precedents.

1. *None of the Cases Commands the Result Produced Here*

The rationale of *Munsingwear* is that a party whose appeal becomes moot has lost its opportunity for judicial review. Therefore, the lower court determination of the case should not be allowed to have preclusive effects against that party. In deciding the case, the Court specifically recognized that the vacation doctrine should only apply to those cases in which a party has been prevented from obtaining review of the judgment through "happenstance." *Munsingwear*, 340 U.S. at 39-40; *see also*, Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589 (1991).

Although the case often is considered in the context of cases that become moot because of settlements pending appeals, *Munsingwear* itself did not involve a settlement at all. It was, instead, an antitrust case that became moot during the government's appeal because of the deregulation of the commodity that was the subject of the price-fixing allegation.

Duke Power, a precursor of *Munsingwear,* did not involve mootness through settlement either. Indeed, after the acknowledgement of the new contract that ultimately caused the case to be vacated, the parties had attempted to continue litigating against each other. Similarly, *Great Western Sugar* grew out of a dispute over the arbitrability of a claim. There, an arbitration ordered by the district court was completed before the appeal was decided, a mooting "happenstance" significantly different from a settlement.[1]

2. *The Rote Application of* Munsingwear *Ignores this Court's Holding in* Karcher

One might argue that a settlement, which represents an intended action of the parties, can never constitute the sort of "happenstance" of which the *Munsingwear* court spoke. Nevertheless, the doctrine of the case frequently has been applied to cases mooted by settlements, but never, at least by this Court, to a case such as this one.

Karcher should suggest that *Munsingwear* applies only to mootness which is the product of true "happenstance," not to mootness created by the parties, and especially not to mootness created by some parties who seek to affect the rights of another party who opposes the settlement.

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[1] The Eleventh Circuit also cited *City Gas* as authority supporting automatic vacatur. While that case apparently was settled, this Court's disposition is embodied in a summary order which is of limited precedential value and does not preclude the Court's later considering more fully the question summarily adjudicated. *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 309 n.1 (1976).

Karcher involved a challenge to a New Jersey law which authorized a minute of contemplative silence in that state's public schools. The case had been defended by two officers of the state legislature who had intervened but were unsuccessful in convincing the lower court that the statute was constitutional. The intervenors lost their leadership posts in the legislature and the persons replacing them stated that they would not defend the statute, which led to the dismissal for lack of jurisdiction of an appeal to this Court.

The now-displaced intervenors asked the Court to vacate the lower court judgments of unconstitutionality. In rejecting that request, this Court distinguished the voluntary withdrawal of the appeal from the "happenstance" described in *Munsingwear* which causes mootness under "circumstances unattributable to any of the parties." *Karcher*, 484 U.S. at 83. The circumstances of the termination of the appeal here more closely resemble those of *Karcher* than they do the circuit court's conception of *Munsingwear*.

The parties who settled the underlying case here did not condition their settlement on vacatur being granted. Indeed, the issue was raised by the court itself. None of this Court's precedents, or the courts of appeals cases (discussed *infra*) following them, have commanded vacatur in the circumstances present here, where the complaining party did not enter into a settlement, opposed vacatur, and was not affected by exogenous happenstance such as a change in the controlling law. Contrariwise, *Karcher* would seem to support the view that vacatur should not enter under such circumstances. *See Clarendon, Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991).

B. Vacatur in this Case Did Not Serve the Interests of Justice as to Petitioner or the Public Generally

1. *Petitioner, Who Did Not Settle or Contemplate Vacatur, Has Been Denied the Benefit of a Favorable Precedent and Has Been Subjected to Considerable Economic Detriment*

As the court of appeals recognized, the settlement agreement entered into by Venice Hospital and Respondent contained no release barring a future action. Pet. App. 5a. Respondent thus was free to bring a second suit, which it has done, requesting additional damages from the original defendants for the time period forward from the settlement, but based on exactly the same causes of action and theories that had been the subject of the judgment of the district court favorable to the defendants in the case at bar. While Venice Hospital should have no cause to complain about the natural consequences of its own action, the preclusion of Petitioner's avoidance of the risk and expense of duplicative litigation under the doctrines of res judicata and collateral estoppel is unconscionable.

Munsingwear itself recognizes that when a party forgoes or dismisses its appeal without settlement, it is clear that res judicata and collateral estoppel apply to the underlying judgment. *Munsingwear,* 340 U.S. at 39. Especially at the behest of a party who did not enter into settlement, it is no less fair to provide the advantages of issue preclusion where a party surrenders appellate review as the product of a settlement from which it benefits.

As the Seventh Circuit held in *In re Memorial Hospital,* 862 F.2d 1299 (7th Cir. 1988):

> *Munsingwear* holds that the judgment in a moot case should be vacated to relieve the parties of collateral consequences when they were unable to obtain appellate review. [Appellants] were not disabled from obtaining review; they have simply chosen, for reasons

> they deem sufficient, to forego the entitlement they possess.

Id. at 1301. *See Clarendon*, 936 F.2d at 130.

In bringing its new action against Petitioner, Respondent would have its cake and eat it too, by obtaining the benefit of a result that it had sought but abandoned because of its self-initiated settlement. It is hardly unfair to apply to Respondent the issue preclusion sought by Petitioner, who was not a party to the settlement. *Compare Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982); *Center for Science in the Pub. Interest v. Regan*, 727 F.2d 1161, 1166 (D.C. Cir. 1984).

As this Court held in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971):

> In any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.

Id. at 329. The Court has held similarly with respect to the collateral estoppel doctrine. *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The vacatur ordered by the court of appeals not only is inconsistent with the tenor of *Munsingwear* and *Karcher*, it unfairly burdens Petitioner—by exposing him to a protracted and expensive lawsuit that he might avoid through application of res judicata or collateral estoppel —in a manner that this Court sought to proscribe in *Blonder-Tongue* and *Montana*.

2. *Respondent's Most-Recent Antitrust Action Demonstrates That Vacatur Did Not Serve Judicial Economy. Nor Would Allowing Judicial Precedent to Be a Private Currency to Be Spent to the Detriment of Parties Not Subject to Settlement Agreements Serve the Public Interest*

Respondent's newly-undertaken litigation is an obvious enough impediment to the realization of Petitioner's interests. At a time when the judicial resources of the federal courts, especially when it comes to hearing civil cases, are so overburdened, the systemic economic effect of the action of the Eleventh Circuit which has enabled this renewed litigation is equally obvious.

The economic effect of protracted and unnecessary litigation is contradictory enough of the public interest. But there is a broader public interest that is threatened by allowing vacatur to be applied as to a party who was a dissident to the settlement/vacatur process.

The mechanistic granting of vacatur leaves profound implications for the public interest in finality, judicial economy and consistency as well as the perception of systemic legitimacy. The *Munsingwear* justification vacating a judgment because of mootness

> does not apply to mootness achieved by purchase. Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.

Izumi, 114 S. Ct. at 431 (Stevens, J., dissenting). *See Memorial Hospital*, 862 F.2d at 1302.[2] *See also* Fisch,

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[2] When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

Id.

Rewriting History, supra; Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments,* 96 Yale L.J. 860, 867 (1987); Michael W. Loudenslager, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments,* 50 Wash. & Lee L. Rev. 1229 (1993).

In addition to depriving the public of a judicial precedent that was created with substantial public economic and implied moral investment, the decision of the Eleventh Circuit (the result of which is a new litigation that further adds to public expense) contradicts the public interest in yet another way.

It is an antitrust axiom that the law exists to protect competition, not competitors. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). The district court had held that Respondent's antitrust claims were legally deficient because there was no evidence of collusive or exclusionary conduct and that Petitioner's conduct was economically justifiable. Thus, the court found vigorous competition for durable medical equipment that maximized consumer choice and minimized consumer cost. The net effect of the court of appeals' vacatur of this holding, besides fomenting further litigation, was to protect a private competitor's interest without consideration of the broader interest of competition in the public marketplace.

In sum, the Eleventh Circuit erred in concluding that its policy of automatically vacating trial court decisions when cases are settled on appeal was consistent with this Court's holdings in *Munsingwear* and related cases, especially as to a non-settling party. And it was further error for the circuit court routinely to grant vacatur without balancing Respondent's personal interest in gaining the unsought removal of an adverse legal precedent against the amalgam of Petitioner's personal interest in avoiding the risk and expense of a duplicative lawsuit,

and the public interest in the maintenance of decisional law, the minimization of litigation and the maximization of competition in the medical marketplace.

II. THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY AMONG THE CIRCUITS AND SHOULD ARTICULATE A CONSISTENT RULE DESCRIBING THE LIMITATIONS OF THE *MUNSINGWEAR* DOCTRINE AND PROVIDING FOR A BALANCING TEST TO DETERMINE WHEN VACATUR SHOULD BE APPLIED

The Court, in considering *Izumi*, had expressed its understanding that there is a pronounced split among the circuits concerning the application of the *Munsingwear* doctrine to cases that become moot pending appellate review.[3] This split has become more troublesome since *Izumi* was dismissed.

A. Vacatur in the Eleventh and Federal Circuits

As the case at bar demonstrates, it is the practice of the Eleventh Circuit routinely to order vacatur and dismissal of district court judgments and cases when cases become moot while on appeal. Pet. App. 11a; *see, e.g., Baxter Healthcare Corp. v. Healthdyne, Inc.*, 956 F.2d 226 (11th Cir. 1992); *Kimbrough v. Bowman Transp., Inc.*, 929 F.2d 599 (11th Cir. 1991); *In re Shelby Motel Group, Inc.*, 925 F.2d 1583 (11th Cir. 1991). *But see Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987). Such vacatur usually arises from the joint motion of the parties, but the instant case demonstrates that the Eleventh Circuit is willing to raise vacatur *sua sponte* and to apply it against a party who opposes it. The inappropriateness of this mechanical approach in this case is discussed *supra*.

At least in those cases where all parties have settled, the Federal Circuit also has uniformly held that vacatur

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[3] *See* Loudenslager, *Erasing the Law*, *supra*.

of the judgment of the trial court must be ordered when settlement moots the action on appeal. *U.S. Phillips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992), *cert. dismissed as improvidently granted sub nom. Izumi*,[4] 114 S. Ct. 425; *Smith Int'l, Inc. v. Hughes Tool Co.*, 839 F.2d 663, 664 (Fed. Cir. 1988); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 280 (Fed. Cir. 1987).[5]

The Federal Circuit adopted this position because, it opined, failure to vacate would subject parties to continued litigation against their will.[6] As we have demonstrated, while that theory might hold true in some cases, it certainly is contradicted here, where vacatur has guaranteed continued litigation.[7]

B. Vacatur in the Second Circuit

The Federal Circuit patterned its view of vacatur on the governing precedent of the Second Circuit. *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985). *See Federal Data*, 819 F.2d at 279-80. Interestingly, there is now some question as to the extent to

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[4] The Federal Circuit, in *Windmere* (later *Izumi*) noted, *id.*, that the settlement included all of the parties on appeal and implies that it might have given more detailed consideration of vacatur under other circumstances. This suggests that the Eleventh Circuit's order of vacatur in the case at bar represents an extension of *Munsingwear* beyond the point to which the Federal Circuit is willing to take it.

[5] *Compare Mapco Alaska Petroleum, Inc. v. United States*, 30 Fed. Cl. 153 (1993).

[6] This rationale is derived from a fear that if parties' requests for vacatur are denied, litigants would be less likely to settle. Available data do not seem to support this fear. *See Izumi*, 114 S. Ct. at 431-32 (Stevens, J., dissenting).

[7] The Eighth Circuit, in *Hendrickson v. Secretary of Health & Human Services*, 774 F.2d 1355 (8th Cir. 1975), does not describe its reasoning but apparently assumes that *Munsingwear* requires vacatur when the parties settle on appeal.

which *Nestle* lays down a uniform rule in the Second Circuit.

In *Nestle*, a trademark infringement case, the court of appeals held that it was an abuse of discretion for the district court to have denied vacatur after having balanced the public interest in the finalization of judgments against the parties' interest in settlement. In reversing, the Second Circuit held that the parties' settlement interests, including avoidance of the costs and risks of further litigation, were paramount and that the district court lacked discretion to engage in balancing. As did the Federal Circuit which followed it, the Second Circuit noted that its fundamental concern was to minimize litigation and encourage settlements, a view perhaps lacking in empirical support and, in any event, inapplicable to the case at bar.

The seemingly-automatic, discretionless rule of *Nestle*, though widely cited, has shown signs of recent erosion. In a post-*Izumi* case, *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993), a panel of the Second Circuit denied vacatur in a loan guarantee case in which the parties proposed a settlement contingent upon vacatur. In so doing, the court analyzed several principles gleaned from the decisions of this Court.

First, the circuit court noted, vacatur is mandatory if, while the appeal is pending, the case has become moot through "happenstance." *Munsingwear*, 340 U.S. at 39-40. Second, the court of appeals should vacate the district court's decision when the right of a party to appellate review is curtailed for reasons of mootness not attributable to that party. *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961). Vacatur in this instance "prevents the party that lost in the district court from suffering from the estoppel effects of that court's judgment when, through no fault of its own, the losing party has lost its right to have the judgment reviewed." *Manufacturers Hanover*, 11 F.3d at 383. Nei-

ther of these principles applies to Respondent in the case at bar. The case did not become moot due to happenstance and Respondent was not prevented from obtaining review of an adverse district court ruling.

The third principle discussed by the Second Circuit in *Manufacturers Hanover* is that "the appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party." *Id.* (citing *Karcher,* 484 U.S. 72). Dissecting this principle, the court recognized:

> If we were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and *to deprive the winning party of the judicial protection it has fairly won.*

Id. (emphasis added). This would be precisely the inappropriate result obtained by Respondent here as a result of the Eleventh Circuit's *en banc* decision.

Manufacturers Hanover suggests an evolution within the Second Circuit, but *Nestle* has not been overruled by that circuit and a balancing of private and public interests in most potential vacatur cases would still seem to be prohibited there.

C. Vacatur in the Seventh and Third Circuits

Several courts of appeals routinely deny motions to vacate based on settlement. The Seventh Circuit, with *Memorial Hospital,* 862 F.2d 1299, is the leader in this camp, and is joined in it by the Third Circuit. *See Clarendon,* 936 F.2d at 129-30.

In *Memorial Hospital,* the court explained the rationale for a position opposite to that illustrated here by the decisions of the Eleventh and Federal Circuits and the Second Circuit in *Nestle,* by noting that prior judicial precedents are not mere private property, but have a so-

cial value produced at public cost. *Memorial Hospital,* 862 F.2d at 1302. Moreover, future litigants have a general interest in an orderly and predictable judicial system that preserves decisional law for future use. While the denial of vacatur might result in higher costs in a given case, the preservation of precedent will reduce costs and complications for litigants and judges in future cases. *Id.*[8]

D. Vacatur in the Ninth, Tenth and D.C. Circuits

The Ninth Circuit, along with the District of Columbia Circuit and, recently, the Tenth Circuit, have attempted to strike a balance between the poles of the traditional *Nestle* approach of the Second Circuit and the *Memorial Hospital* approach of the Seventh Circuit. These courts seek to balance the parties' private interest in vacatur against the facts bearing on the public interest in preserving the district court judgment. *See National Union Fire Ins. Co. v. Seafirst Corp.,* 891 F.2d 762 (9th Cir. 1989); *Ringsby,* 686 F.2d 720. *See also Oklahoma Radio Associates v. FDIC,* 3 F.3d 1436 (10th Cir. 1993); *In re United States,* 927 F.2d 626, 628 (D.C. Cir. 1991); *United States v. Garde,* 848 F.2d 1307, 1310 (D.C. Cir. 1988); *Center for Science,* 727 F.2d 1161.

Similar to the circumstances of the case at bar is *National Union,* 891 F.2d 762. The plaintiff, National Union, had several pending lawsuits against different defendants regarding claims arising out of the same transaction. In the first suit against Seafirst, the jury found for the defendant and the district court entered a judgment upon that verdict. Thereafter, National Union and Seafirst reached a settlement which required National Union to forego its

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[8] The Seventh Circuit will order vacatur in true "happenstance" cases, as the term is used in *Munsingwear. See Jordan v. Indiana High School Athletic Ass'n, Inc.,* No. 93-1435, 1994 WL 44131 (7th Cir. Feb. 15, 1994), in which a failure of standing was held to require vacatur and dismissal. *See Gould v. Bowyer,* 11 F.3d 82 (7th Cir. 1993).

rights of appeal and required Seafirst to support a motion by National Union to vacate the district court judgment.

The defendants in the other actions who had been granted summary judgment against National Union intervened to oppose the motion to vacate. In upholding the district court's refusal to vacate, the Ninth Circuit noted that

> [t]he *Munsingwear* rule is neither statutorily nor constitutionally required. It is equitable in nature, designed to maintain fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision.

National Union, 891 F.2d at 766 (citations omitted).[9]

The court then applied an equitable balancing which tilted towards preserving the interests of third parties (much like Petitioner here) and the possibility that the judgment would preclude future litigation.

The D.C. Circuit applied similar reasoning to hold that the *Munsingwear* procedure should not be applied in certain cases "in order to avoid unfairness to parties who prevailed in the lower court." *Garde*, 848 F.2d at 1310. *See In re United States*, 927 F.2d 626. The Tenth Circuit recently adopted this balancing approach as well in *Oklahoma Radio Associates*. This approach would have made a great deal more sense in the instant case than the one applied by the Eleventh Circuit which has re-

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[9] The Ninth Circuit also held that

> When a party settles, its case is not "unreviewable" in the terms of *Munsingwear* . . . where there is no longer a case or controversy: Settlement is a conscious decision by the party, where it essentially "declines to pursue its appeal." *Karcher*, 484 U.S. at 83 . . . . This is not significantly different from when a party is satisfied with a judgment and does not appeal at all. The dispute is resolved, not made moot by action distinct from the litigation.

Id. See Ringsby, 686 F.2d at 721.

sulted in no discernible benefit to anyone other than Respondent, who continues to litigate.

CONCLUSION

Petitioner submits that, at a minimum, the Eleventh Circuit should have engaged in a balancing of public and competing private interests, but that the instant case also is susceptible to the more rigid formulation of the Seventh Circuit in *Memorial Hospital*. In any event, the Eleventh Circuit has erroneously interpreted the precedents of this Court, and the variances in interpretations among the circuits have created a confusion that should be resolved by this Court.

For these reasons, Petitioner respectfully submits that the Court should grant the petition and should reverse the judgment of the Eleventh Circuit and order the reinstatement of the judgment of the district court.

Respectfully submitted,

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